Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

79-2083

No. .....

IN THE

Supreme Court of the United States

October Term, 1979

UNITED STEELWORKERS OF AMERICA
and
LOCAL 5104, UNITED STEELWORKERS OF AMERICA,
Petitioners,

v.

THE HOMER D. BRONSON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the courts below usurp the arbitrator's contractual function of interpreting the "discharge for just cause" provision of the parties' collective bargaining agreement when those courts vacated the arbitrator's award which imposed a four month disciplinary suspension upon an insubordinate employee but which set aside the penalty of discharge as inappropriate under the contractual "just cause" standard because the employer's discharge procedure denied the employee proper procedural safeguards?

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IN THE

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October Term, 1979

No. .....

UNITED STEELWORKERS OF AMERICA
and
LOCAL 5104, UNITED STEELWORKERS OF AMERICA,
Petitioners,

v.

THE HOMER D. BRONSON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The United Steelworkers of America and its Local 5104 prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Jurisdiction.

OPINIONS BELOW

The opinion issued by the court of appeals in these consolidated cases is not officially reported and is reproduced in the Appendix to this petition at App. 1a-3a.[1] The orders of the court of appeals denying rehearing and rehearing en banc and granting consolidation of the cases on appeal are reproduced in the Appendix at App. 4a-6a. No opinion was issued by the district court in vacating and refusing to confirm the arbitration award. The Judgments of the district court are reproduced in the Appendix at App. 7a-8a. The arbitrator's award and opinion rescinding the discharge of an insubordinate employee for lack of "just cause" is reproduced in the Appendix at App. 9a-28a.

JURISDICTION

The court of appeals issued its opinion and judgment on December 27, 1979, and a timely filed petition for rehearing and rehearing en banc was denied by that court on April 2, 1980. The courts below had jurisdiction of this case pursuant to 29 U.S.C. § 185, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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1. The Appendix to this petition is separately paginated and is referred to herein as "App."

STATEMENT OF THE CASE

For many years the United Steelworkers of America ("Union") and The Homer D. Bronson Company ("Company") have been parties to a collective bargaining agreement, the latest of which is a three year agreement dated August 1, 1977. As would be expected in a mature collective bargaining relationship, these parties have agreed to settle all disputes involving an interpretation or application of the 1977 Agreement through a grievance and arbitration procedure. To that end, the parties have in Article X, "Arbitration," empowered an arbitrator to "interpret this contract and apply it to the particular case submitted to him. . . ."[2] Further, the

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2. Article X, "Arbitration," of the 1977 Agreement provides in relevant part:

> "1. Any dispute not settled under the above grievance procedure and which involves the interpretation or application of this agreement may be taken to arbitration by either party. Arbitration, except as otherwise herein provided, shall be conducted under the Voluntary Labor Arbitration Rules then obtaining of the American Arbitration Association.
>
> * * * *
>
> 3. The arbitrator may interpret this contract and apply it to the particular case submitted to him, but he shall, however, have no authority to add to subtract from, or in any way modify the terms of this contract.
>
> 4. The parties agree that there shall be no suspension of work while such grievances are being settled, and the cost of arbitration shall be borne equally by both parties.
>
> 5. The parties agree to accept the arbitrator's award as final and binding, provided it is not contrary to law."

Company and the Union have agreed that there will be no strikes while their disputes are being settled in the grievance procedure and that once the arbitrator issues his award that award shall be final and binding.

Also as would be expected in a mature collective bargaining relationship, the Company has by contract preserved its management right to discharge employees, but the Union has by contract obtained the protection for the bargaining unit employees that all such discharges must be "for just cause."[3] A dispute over the proper interpretation of these contractual "discharge for just cause" provisions arose between the Company and the Union when on October 26, 1978, the Company discharged employee Joseph Mennillo, Jr. for his alleged refusal to obey an order.

A grievance filed by the Union protesting that the Company's discharge of employee Mennillo was unjust was processed to arbitration. The Company and the Union agreed mutually that employee Mennillo's unjust discharge dispute should be settled by Arbitrator Alfred B. Clark. To that end, the parties submitted the following issue to Arbitrator Clark:

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3. Article XIV, "Management," states that:

"Subject to the conditions of this Agreement, The Company shall not be limited in its right to manage and direct the working forces, including but not limited to the right to hire, suspend and *discharge for just cause* . . . ." (emphasis added). Similarly, Article VII, "Seniority," specifies that:

"10. An employee shall lose seniority in the event of:

* * * *

(b) *Discharge for just cause.*" (emphasis added).

"Was the discharge of Joseph Mennillo, Jr. for just cause? If not, what shall the remedy be?" (App. a).

Arbitrator Clark sustained the grievance, stating "the penalty of discharge is deemed inappropriate and the penalty is reduced to an unpaid, disciplinary suspension." (App. 28a). In doing so, he recognized that Mennillo was "gravely insubordinate" in refusing to carry out his foreman's order to clean up a trash pile (App. 27a); however, he also noted that there had been friction between the foreman and Mennillo, who was Local 5104's president, and that the trash which had been accumulating for months was still there two days after the foreman had fired Mennillo (App. 18a). Although "not persuaded that the subject task was reasonably related to business efficiency," Arbitrator Clark found that "the serious weakness in the Company's position is the lack of due process accorded the Grievant." (App. 27a).

Arbitrator Clark interpreted the "discharge for just cause" contract provision as including the procedural safeguard that prior to the discharge penalty being imposed, an employee charged with insubordination must have the opportunity to explain his side of the story to a management person who was not involved in the insubordination incident (App. 25a, 28a). Because the foreman involved in the incident had fired Mennillo without giving him such an opportunity and had given him "five minutes to leave the premises," Arbitrator Clark reinstated employee Mennillo with full seniority and benefits but without back pay (App. 26a).

The Company's state court action seeking to vacate the Award was removed to federal court, and the Union commenced a separate action to confirm the Award under 29 U.S.C. § 185. Upon cross-motions for summary judgment, the district court entered judgment in both

cases for the Company. The district court did not state any reasons to support its decision to vacate the Award; nor did the Second Circuit give a detailed explanation in affirming the district court's decision. Rather, in a four paragraph opinion, the Second Circuit disagreed with Arbitrator Clark's interpretation of the "discharge for just cause" contractual provision and substituted its own interpretation of the 1977 Agreement for that rendered by the Arbitrator.

REASONS FOR GRANTING THE WRIT

The decision below raises important questions concerning the continuing viability of the strong federal labor policy favoring arbitration which this Court established in the *Steelworkers Trilogy*[4] twenty years ago.

The Second Circuit's decision arrogates to the federal judiciary the power to substitute judicial judgment for that of the parties' mutually selected arbitrator upon a question of pure contract interpretation—the meaning of the parties' contractual "discharge for just cause" requirement. Directly contrary is this Court's decision in *Enterprise Wheel* which forbade the judiciary from meddling in the parties' collective bargaining process—of which arbitration is a continuing part—by holding that ". . . so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling [the arbitrator] because their interpretation is different from his." 363 U.S. at 599.

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4. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

The Second Circuit's decision is also in direct conflict with a later decision of the Eighth Circuit in *Chauffeurs, Teamsters and Helpers, Local 878 v. Coca-Cola Bottling Co.*, —— F.2d ——, 103 LRRM 2380 (No. 79-1196, Jan. 18, 1980), *cert. denied*, 48 U.S.L.W. 3786 (U.S. June 2, 1980) (No. 79-1581) which enforced an arbitrator's ruling, like the one here, that a contractual "just cause" requirement does include significant procedural safeguards. Moreover, it is inconsistent with prior decisions of the Fifth, Tenth and Seventh Circuits enforcing broad arbitral interpretations of contractual "just cause" requirements.[5] However, the Second Circuit's decision is consistent with a line of recent decisions by the Sixth and Fourth Circuits overturning arbitrators' awards as contrary to what the judges on those courts perceive to be the clear and unambiguous language of a given collective bargaining agreement.[6]

Review by this Court is required at this time to resolve this conflict and stem the tide of decisions in some

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5. *Amalgamated Meat Cutters, Local 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir. 1973); *Fabricut, Inc. v. Tulsa General Drivers*, 597 F.2d 227 (10th Cir. 1979); *Int. Ass'n of Machinists, District 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969).

6. *Detroit Coil Co. v. Machinists, Lodge 82*, 594 F.2d 575 (6th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 79 (1979); *General Drivers, Warehousemen and Helpers, Local 89 v. Hays & Nicoulin, Inc.*, 594 F.2d 1093 (6th Cir. 1979) (per curiam); *Timken Co. v. Steelworkers, Local 1123*, 482 F.2d 1012 (6th Cir. 1973); *Monongahela Power Co. v. Local 2332, Int. Bro. of Electrical Workers*, 566 F.2d 1196 (4th Cir. 1976); *Huntington Alloys, Inc. v. Steelworkers*, —— F.2d —— (No. 79-1354, filed June 26, 1980) (petition for rehearing pending).

circuits which is eroding the principle of arbitral supremacy established by the *Steelworkers Trilogy* and to maintain the uniformity of decisions of the courts of appeals in the important area of judicial enforcement of labor arbitration awards.

I. The Second Circuit's Decision Conflicts With Decisions Of This Court Prohibiting The Judiciary From Substituting Its Interpretation Of A Collective Bargaining Agreement For That Of A Labor Arbitrator.

The Second Circuit disagreed with the interpretation of the "just cause" for discharge requirement of the 1977 Agreement rendered by Arbitrator Clark. The Arbitrator interpreted the contractual "just cause" clause as importing the well settled principle of arbitral common law that "just cause" requires management to avoid arbitrary or hasty action where confronted with an insubordination situation as follows:

> "Arbitration awards are consistent in what is generally considered 'tests for just cause.' Among the several tests is the well-accepted guideline that an employer must avoid arbitrary or hasty action when confronted with a situation involving insubordination. * * *
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> * * *
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> * * * * Management was obligated, therefore, to give Mr. Mennillo *an opportunity prior to his discharge* to present the basis for his refusal to obey Mr. Cuff's order and to present to management other extenuating and mitigating circumstances and facts which affected his action or which Management should consider before taking final action." (App. 25a, 27a-28a) (emphasis added).

Notwithstanding the complete lack of an explicit contractual definition of "just cause", the Second Circuit interpreted the steps of the grievance procedure as constituting the full measure of the procedural safeguards contained in the 1977 Agreement as follows:

> "In support of its position, appellant argues that, in view of the opaque nature of the phrase 'just cause', the arbitrator was justified in interpreting it to include due process requirements. In so doing, the arbitrator inserted procedural requirements that were not called for in the collective bargaining agreement. The arbitrator violated Article X, Paragraph 3, of the agreement which states that the arbitrator has no authority to add to or modify the terms of the agreement. The union and the company had agreed to a three-step grievance and arbitration procedure to cover situations such as this and these procedures represent the contractual agreement as to due process." (App. 2a).

In holding that the correct reading of the 1977 Agreement is its interpretation of the three-step grievance procedure rather than Arbitrator Clark's interpretation of the "discharge for just cause" requirement, the Second Circuit engaged in the exact "plenary review * * * of the merits" which this Court emphasized in *Enterprise Wheel* the judiciary has "no business" doing as follows:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their

> interpretation of the contract is different from his." 363 U.S. at 599.

It is important to note that *Enterprise Wheel* involved an arbitrator's determination, similar to that made here by Arbitrator Clark, that the "just cause" clause permits the arbitrator to utilize the due process maxim that the penalty must fit the crime to modify discharges imposed upon employees who were guilty as charged. 363 U.S. at 595. Indeed, this Court noted in *Warrior & Gulf* that the parties choose an arbitrator like Arbitrator Clark because of their "confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." 363 U.S. at 582.

Thus, the Second Court and other circuits have usurped the very contractual interpretation function which these parties and this Court have established is the province of a labor arbitrator. The principle of judicial intervention announced by the Second Circuit threatens to destroy the very fiber of the federal labor policy favoring the peaceful resolution of all grievance disputes through voluntary arbitration which this Court established in the *Steelworkers Trilogy*. Indeed, the entire fabric of our labor laws which this Court has woven out of the fiber of arbitral supremacy and which has been so successful in maintaining labor peace in this Country for two decades will be unraveled unless this Court reaffirms the supremacy of the voluntary arbitral process.

The type of judicial usurpation of the arbitrator's contractual interpretation function in which the Second Circuit engaged in this case runs counter to this Court's recent decision in *Nolde Bros., Inc. v. Local 358, Bakery*

Workers, 430 U.S. 243 (1977), *rhg. denied,* 430 U.S. 988 (1977). In *Nolde,* this Court reinforced the principle of arbitral exclusivity in the area of contract interpretation by holding that, absent an express exclusion clause to the contrary, all questions of contract interpretation are to be decided in the contractually mandated arbitral process even if such questions do not arise until after that contract has expired. Likewise, the Second Circuit's brand of judicial activism is contrary to this Court's decision in *Buffalo Forge Co. v. Steelworkers,* 428 U.S. 397 (1976). This Court refused to permit the federal judiciary to issue injunctions against strikes where the only arbitral issue was the contractual legality of the strike itself because arbitrators might be "* * * heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." 428 U.S. at 412.

Moreover, this Court's decision in *Buffalo Forge* to keep the judiciary out of the merits of contract interpretation disputes was motivated in part by considerations of judicial economy which are equally implicated by this case. Thus, in *Buffalo Forge,* this Court prohibited the federal judiciary from engaging in a preliminary review of the merits of a given contract dispute, a necessary prerequisite to issuing an anti-strike injunction, because in view of the more than 150,000 collective bargaining contracts in this country such rulings "could embroil the district courts in massive preliminary injunction litigation." 428 U.S. at 411 n.12. Unless this Court acts soon to nip in the bud the present trend towards active judicial review of the merits of arbitration awards, the federal courts will be flooded by companies and unions who now accept their arbitral losses

but who would necessarily have to take advantage of one more opportunity to relitigate the merits of their case.

II. The Second Circuit's Decision Is In Conflict With The Decisions Of Other Courts Of Appeals.

The Second Circuit's holding that the "discharge for just cause" provision of the 1977 Agreement does not provide significant procedural protections to employees is directly contrary to the Eighth Circuit's decision in *Chauffeurs, Teamsters and Helpers, Local 878 v. Coca-Cola Bottling Co.*, —— F.2d ——, 103 LRRM 2380 (No. 79-1196, filed Jan. 18, 1980), *cert. denied,* 48 U.S.L.W. 3786 (U.S. June 2, 1980) (No. 79-1581). In the *Coca-Cola* case, the Eighth Circuit affirmed the district court's enforcement of an arbitrator's award where, as here, the arbitrator had converted a discharge into a disciplinary suspension under a "just cause" for discharge clause because the employer, like the Company here, " '* * * did not give the Grievant adequate opportunity to present his side of the case before discharging him.' " 103 LRRM at 2382 (App. 26a). The Eighth Circuit enforced the arbitrator's award holding:

> "In short, the arbitrator here was required to decide what 'just cause' means. His holding that the term has significant procedural implications is not beyond the scope of his authority. His award drew its essence from the contract and cannot be set aside by this Court. United Steelwkrs. of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)." 103 LRRM at 2384.

The Eighth Circuit enforced the award in the *Coca-Cola* case because the contract there, as here, was "silent on what procedural prerequisites attach to the require-

ment that a discharge be for just cause." 103 LRRM at 2383. Thus, a question of contract interpretation was presented for arbitral resolution, and the Eighth Circuit rejected the employer's claim of surprise by noting that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases." 103 LRRM at 2383; *accord,* Getman, *Labor Arbitration and Dispute Resolution,* 88 Yale L.J. 916, 921 (1979).[7]

Similarly, the Fifth Circuit has upheld an arbitrator's interpretation of a contractual "proper cause" for discharge clause as imposing upon the employer the industrial due process burden of proving guilt "beyond a reasonable doubt. . . ." *Amalgamated Meat Cutters, Local 540 v. Neuhoff Bros. Packers, Inc.,* 481 F.2d 817, 819

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7. While by no means universal, the principle that an employer must obtain the employee's side of the story before imposing the penalty of discharge is one of the arbitral common law requirements of "just cause," and the employer must have satisfied that procedural safeguard "before the discipline was 'grieved.' " *Moore's Seafood Products, Inc.,* 50 Lab. Arb. 83, 88, 87 (1968) (Daugherty, Arb.) (Discharge for quitting work early set aside because management official imposed discharge penalty without obtaining employee's "version of the preceding night's events."); *accord, Missouri Research Laboratories,* 55 Lab. Arb. 197, 209 (1970) (Erbs, Arb.) (Discharge for threats of violence reduced to 9 month disciplinary layoff because employer did not meet "burden of the responsibility of having considered any and all facts, from whatever source, that could have an influence on the extent of discipline."); *Farmbest, Inc.,* 44 Lab. Arb. 609, 613 (1965) (Karlins, Arb.) (Discharge for fighting reduced to a 3 month disciplinary suspension because "discharge without reference to the circumstances is arbitrary action."); *Davis Fire Brick Co.,* 36 Lab. Arb. 124, 128 (1960) (Dworkin, Arb.) (Discharge for improper performance of duties reduced to 30 day disciplinary suspension because "the decision to

(1973). Likewise, in *Fabricut, Inc. v. Tulsa General Drivers,* 597 F.2d 227 (1979), the Tenth Circuit upheld an arbitrator's application of the industrial due process maxim that the penalty must be "reasonable" in setting aside a discharge for lack of "just cause" and imposing a one-month disciplinary suspension. The Tenth Circuit did so even though the contract specified, as here, that the arbitrator shall *not* "add to" the terms of the contract and even though the arbitrator found that the employees had violated the contract, as Mennillo did here, by engaging in "'self help' insubordination. . . ." 597 F.2d at 229; *accord, Int. Ass'n of Machinists, District 8 v. Campbell Soup Co.,* 406 F.2d 1223 (7th Cir. 1969), *cert. denied,* 396 U.S. 820 (1969).

The protection against being disciplined arbitrarily which a "just cause" requirement provides is one of the most important protections which a union can secure for the employees which it represents. Moreover, the employees' expectation that arbitrators will not hesitate to set aside peremptory and unfair discharges under a "just cause" provision and that courts will readily enforce such arbitral awards is one of the major factors which makes employees willing to give up their right to strike during the term of a contract which contains an arbitration provision. Thus, if arbitration is to retain its attributes of speed, inexpensiveness and finality which have made it acceptable to unions as an alternative to indus-

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discharge the grievant was an 'on the spot' determination and * * * insufficient and inadequate consideration and appraisal were accorded to the overall situation.") *Consolidated Vultee Aircraft Corp.,* 9 Lab. Arb. 510, 514 (1948) (Abernethy, Arb.) (Discharge for loafing set aside because "no adequate investigation preceded the termination.").

trial strife, this Court should issue a write of certiorari to review the Second Circuit's decision refusing to enforce this arbitration award.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circut, held at the United States Courthouse in the City of New York, on the 27th day of December, one thousand nine hundred and seventy-nine.

Present: Hon. LEONARD P. MOORE, Hon. WILLIAM H. TIMBERS, Circuit Judges; Hon. LLOYD F. MACMAHON, United States District Judge, Sitting by Designation.

Docket Nos. 79-7476; 79-7477

THE HOMER BRONSON COMPANY,
Plaintiff-Appellee,
v.
UNITED STEELWORKERS OF AMERICA,
and
UNITED STEELWORKERS OF AMERICA
LOCAL 5104,
Defendants-Appellants.

UNITED STEELWORKERS OF AMERICA,
Plaintiff-Appellant,
v.
THE HOMER BRONSON COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

Filed: December 27, 1979

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Appendix.

The essential question on these cross-appeals is whether the arbitration award in question draws its essence from the terms of the collective bargaining agreement. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). We agree with the district court that it does not.

Appellant Union contends that the contractual requirement that an employee be discharged only for "just cause" incorporates the question of whether the discharged employee has been accorded due process. Thus it argues that the arbitrator did not exceed the terms of the collective bargaining agreement in ruling that, because Mennillo had not been accorded due process, he had not been discharged for just cause.

In support of its position, appellant argues that, in view of the opaque nature of the phrase "just cause", the arbitrator was justified in interpreting it to include due process requirements. In so doing, however, the arbitrator inserted procedural requirements that were not called for in the collective bargaining agreement. The arbitrator violated Article X, Paragraph 3, of the agreement which states that the arbitrator has no authority to add to or modify the terms of the agreement. The union and the company had agreed to a three-step grievance and arbitration procedure to cover situations such as this and these procedures represent the contractual agreement as to due process.

Alternatively, appellant argues that the arbitrator's award was not based solely upon the alleged procedural deficiencies. It interprets the arbitrator's statement that he was was unpersuaded that Mennillo's assigned task was reasonably related to business efficiency to mean that the arbitrator found an alternative ground for con-

cluding that Mennillo was not discharged for just cause. We disagree. The arbitrator found Mennillo to be "gravely insubordinate". Implicit in that is a finding that Mennillo's task was a legitimate one. *See* Arbitrator's Opinion at 10. We read the arbitrator's award to mean that he set aside the discharge solely because of procedural irregularities.

Affirmed.

LEONARD P. MOORE
WILLIAM H. TIMBERS
Circuit Judges

LLOYD F. MACMAHON
United States District Judge
Sitting by Designation

Appendix.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of April, one thousand nine hundred and eighty.

THE HOMER D. BRONSON COMPANY Plaintiff-Appellee v. UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, LOCAL 5104, Defendants-Appellants	79-7476 79-7477

Filed April 2, 1980

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant United Steelworkers of America, AFL-CIO, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

Appendix.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Second day of April, one thousand nine hundred and eighty.

Present: HON: LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
Circuit Judges
HON: LLOYD F. MACMAHON
District Judge

THE HOMER D. BRONSON COMPANY Plaintiff-Appellee v. UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, LOCAL 5104, Defendants-Appellants	79-7476 79-7477

A petition for a rehearing having been filed herein by counsel for the appellant United Steelworkers of America, AFL-CIO,

Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED

A. DANIEL FUSARO,
Clerk

Appendix.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of July, one thousand nine hundred and seventy-nine.

THE HOMER D. BRONSON COMPANY,
Plaintiff-Appellee
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO, and
UNITED STEELWORKERS OF AMERICA, LOCAL 5104
Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellants dated July 13, 1979 to consolidate the appeals in Docket No's 79-7476 and 79-7477 be and it hereby is granted.

ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE HOMER D. BRONSON COMPANY
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL NO. 5104, ET AL

CIVIL NO. N-79-94

Filed June 13, 1979

JUDGMENT

This action came on for consideration on plaintiff's Application to Vacate or Modify Arbitration Award before the Honorable T. F. Gilroy Daly, U.S.D.J., and the Court, on June 11, 1979, having granted said Application to the extent that the plaintiff is not required to reinstate Mr. Manillo or extend other benefits recited by the arbitrator, and the Court having dismissed defendant's counterclaim,

It is ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the plaintiff vacating or modifying the arbitration award to the extent that the plaintiff is not required to reinstate Mr. Manillo or extend other benefits recited by the arbitrator, and that the defendant's counterclaim be and is hereby dismissed.

Dated at New Haven, Connecticut, this 13th day of June, 1979.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By FRANCES J. ANGELO
Deputy In Charge

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STEELWORKERS OF AMERICA, AFL-CIO v. THE HOMER D. BRONSON COMPANY	CIVIL NO. N-79-95

Filed June 13, 1979

JUDGMENT

This action came on for consideration on plaintiff's Application to Confirm Arbitration Award before the Honorable T. F. Gilroy Daly, U.S.D.J., and the Court, on June 11, 1979, having denied said application and ordering judgment to enter for the defendant,

It is ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the defendant dismissing this action.

Dated at New Haven, Connecticut, this 13th day of June, 1979.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By FRANCES J. ANGELO
Deputy In Charge

Appendix.

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
UNITED STEELWORKERS LOCAL 5104
—and—
HOMER D. BRONSON COMPANY
CASE NUMBER: 12 30 0371 78 (Grievance No. 101)

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated August 1, 1977 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

Within three working days from the receipt of this Award by the Company, Joseph Mennillo shall be reinstated to the job he held with the Company on October 26, 1978. His discharge of October 26, 1978 is reduced to an unpaid, disciplinary suspension covering the period from October 26, 1978 until his return to work. Although he is not entitled to back wages, his seniority and other contractual benefits shall be restored retroactively to October 26, 1978.

ALFRED B. CLARK
Arbitrator's signature
(dated) 2-23-79

STATE OF
COUNTY OF } ss.:

On this day of , 19 , before me personally came and appeared
to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Appendix.

In the Matter of the Arbitration Between UNITED STEELWORKERS LOCAL 5104 —and— HOMER D. BRONSON COMPANY	DISCUSSION AND OPINION OF ARBITRATOR CASE NO.: 12 30 0371 78 (Grievance No. 101)

ARBITRATOR:

Alfred B. Clark, selected by the Parties under the Voluntary Labor Arbitration Rules of the American Arbitration Association (A.A.A.) and under the terms of Article X (*Arbitration*) of the Agreement dated August 1, 1977 between the Homer D. Bronson Company (hereinafter referred to as the "Company") and the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Union").

APPEARANCES:

For the Union—

David B. Rome, Esq.
Attorney at Law
Angoff and Goldman
Boston, Massachusetts

For the Company—

Sidney A. Coven, Esq.
Attorney at Law
Lepie & Coven
Boston, Massachusetts

HEARING:

The hearing was held at the New Haven Motor Inn, New Haven, Connecticut, on February 13, 1979.

Appendix.

ISSUE

The Parties agreed at the hearing on the following statement of the issue:

Was the discharge of Joseph Mennillo, Jr. for just cause? If not, what shall the remedy be?

Applicable Article of the Contract

ARTICLE XIV

Management

1. Subject to the conditions of this Agreement, The Company shall not be limited in its right to manage and direct the working forces, including but not limited to the right to hire, suspend and discharge for just cause; the right to transfer employees to different jobs; the right to maintain discipline and efficiency; the right to relieve employees from duty because of lack of work or for other legitimate reasons; the right to determine the product to be manufactured, the methods and process and means of manufacture; the scheduling of operations; and the right to introduce new and improved methods and operations or to extend, limit or curtail existing conditions.

2. The Company agrees that it will not exercise its management powers contrary to the terms of this Agreement. If any action of the Company, pursuant to its management powers, is claimed to violate the provisions of this agreement, the directions of management shall be complied with and the matter shall be brought up as a grievance. (Unless it is unsafe, immoral or illegal.)

Appendix.

BACKGROUND

On October 26, 1978, Joseph Mennillo, Jr., the Grievant, who had been employed by the Company since September 9, 1957, and who is President of Local 5104, was discharged by the Company for (in the words of Company Counsel) his "refusal to obey a direct order." During his period of employment, Mr. Mennillo had held various hourly paid jobs with the Company. On the day of his discharge, he was classified as a *Receiver,* a Labor Grade 6 job classification—a job he had held for approximately a two year period.

On the above date, at approximately 12:30 p.m., George William Cuff, Jr., Receiving Foreman and the Grievant's immediate supervisor, contacted Mr. Mennillo and assigned him to "clean-up" the trash which had accumulated on the ground in the area of the "dumpster," a trash receptacle placed close to one end of the receiving and shipping platform of the plant. Mr. Mennillo voiced his objection to the assignment, insisting that such clean-up task was not part of his job as a *Receiver,* that it was more properly a maintenance man's job, and that if he was to be given the task in question he was entitled to receive a Labor Grade 7 rate (a higher Labor Grade) for the time required to accomplish the task[1], and advising that he (Mr. Mennillo) would grieve the subject assignment.

Mr. Mennillo prior to starting the clean-up assignment, made a delivery of supplies to the Plating Depart-

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1. Mr. Cuff uncertain as to the rate to be paid, checked with the appropriate Company official who reported that the Grievant was not correct in claiming that he was entitled to a Labor Grade 7 rate. Mr. Mennillo was advised accordingly.

ment. While returning to the receiving and shipping platform, he was approached by Edward Siemenski, a production machine operator. Mr. Siemenski attempted to give the Grievant several requisitions required by him in the performance of his production duties. Mr. Mennillo advised Mr. Siemenski that he was unable to immediately fill the requisitions but that they should be left at his (the Grievant's) work bench and he would get to them as soon as possible. Mr. Mennillo returned to the receiving and shipping area and began to sweep in the area adjacent to the "dumpster."

"Ten or fifteen" minutes later, Mr. Cuff returned to the platform and observed that the Grievant had left the area of the "dumpster." As he was standing there, the Grievant approached him from a position opposite to that of the "dumpster." Mr. Mennillo reported to Mr. Cuff that he had stopped sweeping because it was raining. Mr. Cuff responded that there was "adequate rain gear" upstairs in his office and available and that the Grievant should use it and return immediately to his clean-up task. The Grievant refused.

Mr. Cuff summoned James C. Coffey, Jr., Shipping Foreman, to witness the Grievant's refusal to perform the subject task. Mr. Cuff in the presence of Mr. Coffey repeated the order to the Grievant. Again the Grievant refused. The Grievant was then told by Mr. Cuff that he "was fired" and that he (Mr. Mennillo) had "five minutes to leave the building."

POSITIONS OF THE PARTIES

THE COMPANY'S POSITION

On October 26, 1978 the Grievant refused to obey a lawful order of his supervisor. In his capacity as a

union officer he was surely aware that he was obligated to comply with the orders of his superiors, just as all other employees must, unless reasonable grounds existed for believing that the order was hazardous to life or health.

Such grounds did not exist relative to the assignment given to him on the afternoon of the day in question. Although maintaining that it was not raining when he was initially given the assignment, the Company concedes that it was raining when he stopped the clean-up task. However, the rain, at worse, was "light," and Mr. Mennillo was aware that suitable "rain gear" was available for him to wear, and the outside October temperature was no lower than '55 to 60 degrees." In fact, Vice President and General Manager Donald A. Briggs testified that there was no need for him (Mr. Briggs) to wear his raincoat while he was out to lunch and that when traveling on his return to the plant, at about 1:00 p.m., it was not necessary for him to turn on his automobile's windshield wipers.

A history exists showing the employee in the past as insubordinate and repeatedly challenging Mr. Cuff's authority. In support of this assertion, Counsel for the Company points to the findings by Arbitrator Robert Stutz in A.A.A. Case No. 12 30 0051 78, Arbitrator Arnold Zack in A.A.A. Case No. 12 30 0140 78, and Arbitrator Lawrence Holden, Jr. in A.A.A. Case No. 12 30 0253 78—all of the Awards in whole or in part relating to the Grievant's past misconduct. Added to the above findings is the testimony of Mr. Cuff who related that one week following his employment as Forer.an the Grievant tried to make "the new guy look bad," and that during September 1978 went in the presence of other

employees into a "temper tantrum" over a stock moving assignment, causing considerable embarassment to Mr. Cuff and posing a challenge to Mr. Cuff's authority. No formal warning was issued but Mr. Cuff admonished that future similar behavior on the part of the Grievant would not be tolerated and Mr. Cuff advised the Grievant that honest differences relative to a work assignment should be discussed privately between them.[2]

Company Counsel points also to Mr. Cuff's testimony relative to an assignment given to Mr. Mennillo during the morning hours of October 26, 1978 as reflective of the Grievant's continuing disregard of supervisory authority.[3] On this occasion, Mr. Mennillo was assigned to move stock as directed by Kevin Briggs (an assistant to the Company's Purchasing Agent) who was performing an inventory count of certain items. Mr. Briggs later reported to Mr. Cuff that Mr. Mennillo "virtually didn't lift a finger to help him."

The clean-up assignment given to Mr. Mennillo the afternoon of October 26, 1978 was not unusual, nor intended to be demeaning to the Grievant, as the Company practice is to assign such tasks to any employee, in any

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2. Mr. Cuff later informed Ronald A. Hamilton, Manufacturing Manager of the September incident. Mr. Hamilton disapproved of the mild action taken by Mr. Cuff, pointing out that it was "a serious offense," and that Mr. Cuff would have been "within his rights to fire" the Grievant.

3. It was suggested that the Grievant's conduct and attitude emanates from his frustration in "losing nine of ten" recent arbitration cases and his failure to have the Company concede, through a charge filed with the National Labor Relations Board (Case No. 1-CA-14, 661), that it was in violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

one of the various job classifications of the Company, when the primary work of the employee has slackened or is "not pressing." As far as Mr. Cuff knew no "pressing" work existed for the Grievant on the afternoon of October 26, 1978. If a delivery was urgently required in the Plating Department, the Grievant did not acquaint Mr. Cuff with this fact.

Mr. Cuff's interpretation of the fifth paragraph of the Grievant's job description, which reads that a *Receiver* "[m]ay be required to move scrap to final collection storage," correctly covers the subject clean-up assignment. The Grievant's job description reads:

JOB DESCRIPTION

Code Number .....
Dept. 65
Labor Grade 6

Job Name RECEIVER

Description:

Is responsible for the receiving, verification, posting and storage of incoming material, delivery of material to consuming departments, rehandling of returned material or goods and truck of scrap.

Uses powered fork lift trucks, stevedore truck, hand truck, over head crane with material grabs or overhead crane with suspend-a-lift.

Receives all materials, unloads from trucks indoors and out, counts and/or weighs, posts and puts stock away in assigned locations throughout the plant.

Gets and delivers raw materials to consuming departments based on requisition. May be required to set up paper material in reel in consuming departments.

May be required to move scrap to final collection storage.

Weighs, recards and stores issued stock that is returned to department.

Checks in returned goods and delivers to appropriate department when instructed.

Date 9/9/74 Prepared by ejm

This description covers the major duties performed but is not intended to be all inclusive. Additional duties may be performed of a type which would not alter the rating of the job.

Although the Union in its presentation attempts to "obscure the real issue," the fact remains that the Grievant was insubordinate. The subject assignment was not "unsafe." The Grievant's course of action, if he believed the assignment improper under the Agreement, was to complete the assignment, then contest the propriety of the assignment through the established grievance procedure. The history of breaches of discipline by the Grievant, together with his failure to respond to past corrective efforts by the Company, warrants discharge in this case.

The Union's Position

Counsel for the Union argues that the action of the Company in discharging Mr. Mennillo fails to meet the test of "just cause." Work of an urgent nature, and covered by the Grievant's job description, existed at the

time he was singled out for what to him was an "extraordinary" and personally disagreeable task — a task neither encompassed nor intended in the make-up of the *Receiver* job.

Counsel points to Section 2 of Article XIV (*Management*). Under this provision, he maintains, an employee is relieved from complying with a management directive if the action ordered is "unsafe, immoral or illegal." In view of the weather in the afternoon in question — "a steady drizzle" worsening over a period of time to "a heavy rain" — performance of the out-of-doors clean-up task would have exposed the Grievant to an element detrimental to his health, particularly since the "rain gear" offered by the Company was not adequate protection for an employee for an extended period of work in the rain.

Furthermore, the trash accumulation around the "dumpster" had been there for several months without maintenance or other Company personnel being assigned to clean it up. Obviously management had not regarded the so-called "eyesore" as something requiring prompt correction. The insistence, therefore, by management that the "dumpster" area be immediately picked-up[4] by the Grievant during a rain storm carries the suggestion that management was using the occasion to retaliate against Mr. Mennillo for his actions as a Union Official. The record supports this inference, Union Counsel asserts.

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4. A photograph of the "dumpster" area (presented in evidence by the Union) taken by a Union official on Saturday October 28, 1978, two days following the discharge of the Grievant, shows the subject area still un-swept.

The Grievant since becoming the Local Union President has found it necessary to file numerous grievances to assure the continuation of beneficial practices and working conditions. And he has found it necessary to file a complaint with the National Labor Relations Board charging a "refusal to bargain."[5]

Mr. Menillo has been employed by the Company for more than a 21 year period and has been regarded dur-

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5. In the entering into a "Settlement Agreement," with the understanding that the Company was making no admission of a violation of "Section 8(a) (1) or any other Section of the National Labor Relations Act, as amended," the Company consented to the posting of the following notice, set forth on NLRB form 4722 *[Notice to Employees — Posted Pursuant to a Settlement Agreement Approved by a Regional Director of the National Labor Relations Board]:*

The National Labor Relations Act gives all employees these rights:

To engage in self-organization;

To form, join, or assist unions;

To bargain collectively through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any and all of these activities.

WE WILL NOT restrain or coerce our employees in the exercise of the aforementioned rights. More specifically,

WE WILL NOT refuse to allow employees to be represented by Local 5104, United Steelworkers of America during a disciplinary meeting.

WE WILL NOT threaten employees with loss of bargaining unit work if Local 5104, United Steelworkers of America enforces its collective bargaining agreement and safety conditions.

ing this period of time as a competent employee. The arbitration awards presented by the Company (and referred to above by Company Counsel) fail to support the picture, the Company hopes to portray, of an insubordinate and uncooperative employee, as the incidents giving rise to these arbitration cases differ substantially from the instant matter. The incidents detailed by Mr. Cuff and considered by him as challenges to his supervisory authority are undocumented — no written warnings having been issued to the Grievant or other disciplinary action having been taken by the Company.

The subject assignment was to say the least "extraordinary" and posed a hazard to the Grievant's health if carried out. Under the terms of the Agreement, therefore, he was not obligated to continue the out-of-doors clean-up work once it started to rain. (Counsel noting that the Grievant started the work and stopped only when it began to rain.)

Regardless of any consideration which may be given to the Company's claim of improper conduct by the Grievant, this case must be viewed on its particular merits. The Company has not justified its October 26, 1978 action. Mr. Mennillo has been unsuccessful in obtaining other employment, has been unable to collect State unemployment compensation, and consequently has suffered an income loss since October 26, 1978. He should be immediately reinstated, therefore, with back pay and with all contractual benefits restored.

DISCUSSION AND OPINION

Insubordination is always a serious offense. Management must have the right to control its operation and its work force. This right means that those individ-

uals in supervision can direct the employees assigned to them with the expectation that their directives will be carried out. The purpose behind the employment relationship is the accomplishment of the work deemed necessary by the employer; it follows, therefore, that employees must accept the authority of the supervisor. And respect for authority is an essential element in the efficient operation of the enterprise.

Insubordination arises when an employee shows disrespect toward a member of supervision, for by doing so he is challenging the authority structure of the organization. Quarreling at length with a supervisor and delays in responding to orders can be considered as insubordination. (However, it is not insubordination to complain briefly about a particular order or to raise a good faith question regarding a order.)

Although insubordination can be exhibited in several ways, as the Company related in its presentation of its past dealings with Mr. Mennillo, most frequently, as in the October 26, 1978 incident, it is the alleged refusal of an employee to perform a legitimate work assignment. The rule generally followed by arbitrators when dealing with a refusal to obey issue is that employees must not take matters into their own hands by refusing to comply with a work order, but should carry out the order and then seek relief through the established grievance procedure. Arbitrator Paul W. Hardy in *City of Memphis* [A.A.A. Case No. 114] in his 1971 opinion on this issue follows the thinking of most arbitrators (in both the private and public sectors). He states:

> No employee may properly refuse and/or adamantly persist in the refusal to obey a work order on the ground that the order or directive violates some

> right of his under the contract or a job description — no matter how clear the violation may seem to him . . . an employee's obligation is to perform the work directed and grieve later —for his remedy lies in orderly resort to the grievance procedure of the contract.

However the above rule has its limitations. An employee may properly refuse to carry out a work order that is threatening to his health or safety, or that requires him to violate the law or commit an immoral act. Section 2 of Article XIV of the Agreement between the parties details this principle.

The Grievant, pointing to the above Section of the Agreement, bases his refusal to comply with Foreman Cuff's October 26, 1978 directive on the fact that it was raining that afternoon, that proper protective clothing was not offered to him and to comply with Mr. Cuff's order would have been injurious to his health. (The Grievant and the Union's witnesses described the degree of precipitation as "a heavy drizzle" worsening to "a steady rain"; on the other hand the Company maintains that nothing more than a "misting" or a "light drizzle" was occurring. The Grievant claims that his clothing was wet when he stopped work; both Union and Company witnesses were unable to positively state what the exact condition of the Grievant's clothes had been at the time of his discharge.)

The Grievant rejects the stand taken by the Company that he was offered adequate rain gear, insisting that the raincoat and "hard hat" available to him were insufficient to protect him over an extended period of time. However, no evidence was submitted indicating that the Grievant requested fuller protective coverage

of the type worn by the Company's maintenance personnel when working out of doors in inclement weather, or that Mr. Cuff would have obtained full protective clothing for him had the Grievant requested it.

No evidence was presented showing the Grievant in poor health or particularly susceptible to colds. The outside temperature, according to Mr. Cuff and not refuted by the Union, was not below 55 to 60 degrees Fahrenheit. The popular belief that chilling alone leads to colds lacks scientific evidence. Artic explorers are notably free of colds during the coldest months of the year . . . the colds return when their contact with civilization (and viruses) is reestablished.[6]

Exposure to a person with a cold is one of the important causes. When American troops landed on Attu during World War II, for several days their bodies were constantly chilled and wet. Yet there were remarkably few cases of colds among the troops.[7]

The Merck Manual of Diagnosis and Therapy [Merck, Sharp & Dohme Research Laboratories, 1977, pg. 33], under the heading,"The Common Cold," reads:

> Predisposing factors have not been clearly identified. Chilling of the body surface will not by itself induce colds and susceptibility is not affected either by the person's health and nutrition or by upper respiratory tract abnormalities (e.g., enlarged tonsils or adenoids). Infection may be facilitated by excessive fatigue, allergic nasopharyngeal disorders, or inhalation of noxious fumes . . . .

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6. *Encyclopedia Americana,* Volume 7, pg. 219.
7. *World Book Encyclopedia,* Volume 3, pg. 1548.

Based upon the above references, the Arbitrator is not persuaded that the order requiring Mr. Mennillo to work out-of-doors in the rain, when protective clothing was available (and perhaps even fuller covering could have been provided upon his request), was manifestly and irrefutably "unsafe." Every job presents situations in which hazards are present but unimportant. Cooks in a hotel kitchen are subject to possible slight burns from stove and hot grease when cooking foodstuffs and to minor knife cuts in preparing foods and even a housewife when performing domestic duties in her house is subject to ordinary household hazards.

Other jobs routinely present situations to an employee that are extremely hazardous; proximity to moving mechanical parts, electric shock, working on scaffolding and high places, exposure to burns and radiant energy, exposure to all types of explosives, and exposure to toxic chemical and biological agents. The application of the word "unsafe" must be applied in different ways to different jobs and according to the particular qualifications and expertise of the employee involved.

The word "unsafe" would surely apply to a situation which serious injury or death could result from requiring an employee to perform an unfamiliar, hazardous task for which he has neither the training or physical capability, such as work on an electrical unit where electrocution is a possibility if any one of a number of possible errors is made. To direct Mr. Mennillo to climb a telephone or light pole during a lightning storm would be an "unsafe" order. However, if he was employed as a "line-man" he could very well be expected to climb poles to repair powerlines regardless of the

weather. (In fact, it is standard practice to provide linemen with a canvas tent when working on poles during rain or snow storms.)

The word "unsafe" as set forth in Section 2 of Article XIV, therefore, anticipates hazardous conditions or situations which are far removed in terms of safety from the routine tasks normally performed by an employee in his job classification.

Arbitration awards are consistent in what is generally considered "tests for just cause." Among the several tests is the well-accepted guideline that an employer must avoid arbitrary or hasty action when confronted with a situation involving insubordination. Mr. Mennillo's union status does not shield him from charges of misconduct. A union representative may be immuned for acting within the scope of his recognized union responsibilities but he is properly subject to discipline for his actions as an employee. However, exceptional care should be exercised when taking disciplinary action against a top union officer for management may not discriminate against such employee because of union activities legitimately conducted.

It is reasonable to expect, therefore, that a management prior to the discharge of a top union officer would make certain that no abberation from due process was present. Mr. Coffey witnessed the Grievant's actual refusal on October 26, 1978 to obey Mr. Cuff's order. Mr. Coffey's role in the discharge ended at that time. It was Mr. Cuff who made the decision to discharge and to give the Grievant only five minutes to leave the premises.

Mr. Cuff was hired by the Company on August 21, 1978. The three arbitration cases cited by Company

Counsel in his presentation arose from situations or incidents occurring prior to Mr. Cuff's employment and two of the Awards were handed down prior to Mr. Cuff's hiring date. It appears unlikely, therefore, that Mr. Cuff had sufficient first hand or personal knowledge of these cases to make a judgment as to what weight these prior incidents should be given in arriving at his decision to discharge. It appears more likely to the Arbitrator that these Awards had no affect at all on Mr. Cuff's determination — the arbitral rulings later being brought out of the Company's files, in effect as an afterthought, to bolster Mr. Cuff's hasty action.

Management, it seems, supported Mr. Cuff's decision solely upon his allegations concerning the events of October 26, 1978 and without objectively and unbiasedly investigating all circumstances surrounding the charge. And without affording the Grievant the opportunity of a full hearing (conducted by a member of senior management who was not directly involved in the October 26, 1978 situation) with the Grievant present prior to the discharge. The efforts made by the Local's Vice President on the afternoon of October 26, 1978, following the discharge, to get Mr. Cuff's decision countermanded does not, in the opinion of the Arbitrator, constitute due process as the decision to discharge had already been taken by Mr. Cuff, prejudicing to some extent the possibility of a fair review of the matter by another member of management. Had Mr. Cuff simply suspended the Grievant pending a review of all the circumstances by senior Management, particularly because of Mr. Mennillo's Union status, the suggestion of possible mixed motives in the abrupt discharge of the Local Union President would not appear.

When a management ignores the need for a review of the actions of a foreman in disciplining a high union officer impulsive and arbitrary decisions are more likely to exist as management is blocked in these instances from considering all mitigating factors. Denial of due process also frequently prevents consideration of the various alternatives to discharge and a full evaluation of all the circumstances having a bearing on the alleged offense.

The facts show that Mr. Mennillo was gravely insubordinate on October 26, 1978; the task he was directed to perform in the rain cannot be considered "unsafe" in the sense conveyed in the language of Section 2 of Article XIV of the Agreement. Although the Arbitrator is not persuaded that the subject task was reasonably related to business efficiency, which in some way would be adversely affected if the clean-up of the "dumpster" area was not performed, regardless of the weather, on the afternoon of October 26, 1978, the serious weakness in the Company's position is the lack of due process accorded the Grievant.

The Grievant should have been suspended rather than being summarily discharged. The end result could very well have been the same, with the Company sustaining the discharge, even if the matter had been reviewed prior to discharge, but fundamental fairness dictates that notice and the right to a full, objective hearing be afforded prior to a deprivation.

The extent to which procedural due process must be afforded a person is influenced by the extent to which he may be subject to suffer grievous loss. Mr. Mennillo stood to suffer a substantial loss of earnings and an impairment toward obtaining other gainful employment. Man-

agement was obligated, therefore, to give Mr. Mennillo an opportunity prior to his discharge to present the basis for his refusal to obey Mr. Cuff's order and to present to management other extenuating and mitigating circumstances and facts which affected his action or which Management should consider before taking final action. In view of the above consideration, the penalty of discharge is deemed inappropriate and the penalty is reduced to an unpaid, disciplinary suspension.

February 23, 1979

ALFRED B. CLARK
Arbitrator

Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-2083.

UNITED STEELWORKERS OF AMERICA,
AND
LOCAL 5104, UNITED STEELWORKERS OF AMERICA,
PETITIONERS,

v.

THE HOMER D. BRONSON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of the Homer D. Bronson Company in Opposition to Petition for a Writ of Certiorari.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-2083.

UNITED STEELWORKERS OF AMERICA,
AND
LOCAL 5104, UNITED STEELWORKERS OF AMERICA,
PETITIONERS,

v.

THE HOMER D. BRONSON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of the Homer D. Bronson Company in Opposition to Petition for a Writ of Certiorari.

Counterstatement of the Question Presented.

Did the courts below properly vacate an arbitrator's award which did not draw its essence from the parties' collective bargaining agreement in that said award imposed a predischarge procedural due process hearing which had not been agreed to by the parties?

Counterstatement of the Case.

In its Petition for a Writ of Certiorari, the United Steelworkers of America (hereinafter "The Union") stated the bargaining history between itself and the Homer D. Bronson Company (hereinafter "The Company") which serves as

the underlying basis under which this case arose. The Union has also set forth the applicable contract language concerning the settlement of grievances through the arbitration process (Petition for Writ of Certiorari at Footnote 2.) The Union correctly points out that "once the arbitrator issues his award, that award shall be final and binding." (Union Brief at page 4.) However, that broad statement is subject to two very important contractual limitations. The contract clause providing for Arbitration (Article X) provides that:

> "5. The parties agree to accept the arbitrator's award as final and binding, *provided it is not contrary to law.*" [Emphasis supplied.]

Moreover, the Arbitrator's discretion has been circumscribed by the parties to the effect that:

> "3. ... he (the Arbitrator) shall, however, have no authority to add to, subtract from, or in any way modify the terms of this contract."

On October 26, 1978 Joseph Mennillo, Jr., was discharged by his foreman for insubordination after twice refusing an assignment of work.[1] The same day, in accordance with Article IX of the contract,[2] entitled "Grievances," the

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[1] Mr. Mennillo's past disciplinary record with the Company can be described as dismal at best. On November 18, 1977 he received a written warning for insubordination. On March 20, 1978, Mennillo was suspended for seven days for insubordination—the willful disobedience of direct orders from management. A further suspension for three days was imposed on April 5, 1978 for taking time off from work without permission. Arbitrators approved the action taken by the Company in each of the foregoing instances (App. 14a-15a.).

[2] ARTICLE IX

Grievances

1. All grievances will be taken up in the following manner:
(a) Between the employee and his foreman or the steward and his foreman or the employee, steward and foreman. The foreman will give his verbal answer within twenty-four (24) hours. (Continued on page 3).

Union's Vice President and Mennillo's foreman met to discuss the discharge (App. 26a.).[3] An additional meeting was held between the Company and the Union in accordance with Article IX of the contract prior to the filing by the Union for arbitration. Since the Company refused to change its position that discharge was merited, on October 29, 1979 the Union filed for arbitration.

The question as to whether the Company had just cause for discharging Mennillo was submitted to Arbitrator Alfred B. Clark. Arbitrator Clark found that Mennillo was "gravely insubordinate" in his refusal to carry out a legitimate order of his foreman (App. 27a.). Despite this finding the Arbitrator

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(b) If the verbal answer given by the foreman is not satisfactory the grievance is to be written in triplicate and shall contain:
   (1) the time, day and department;
   (2) the workers involved, if any, by name and clock number;
   (3) the nature of the grievance, Article of contract violated and remedy or adjustment requested, and one copy to be handed by the Local Union President or his designee to the Personnel Department. The Personnel Department will give a written answer to the steward within three (3) working days, unless mutually extended.

(c) If the Personnel Department's answer is not satisfactory, the Local Union President or his designee will file a request to the Personnel Department for a meeting of the Union Grievance Committee, the International Representative of the Union (meeting can be held without International Representative if he is not available) and representatives of the Company. This meeting will be held within three (3) working days. The Company will give the Union a written report of the results of this meeting within three (3) days.

(d) If the grievance is not settled at such meeting, it can be referred to arbitration pursuant to Article X hereof.

[3] "App." references are to the Appendix contained within the Petition for Writ of Certiorari filed herein.

reduced the discharge to an unpaid suspension solely because of his view that "... fundamental fairness dictates that notice and the right to a full, objective hearing be afforded prior to a deprivation" (App. 27a.).

Thereafter, the Company commenced an action in state court seeking to vacate or modify the arbitration award, arguing that the award, by requiring a predischarge hearing, was contrary to law because, by imposing such a requirement, the arbitrator had impermissibly added to the terms of the parties' agreement. The Union removed this action to federal court and counterclaimed for enforcement of the award. The Union also filed a separate action to have the award confirmed.

The United States District Court for the District of Connecticut and the Court of Appeals for the Second Circuit both vacated the arbitrator's award, holding that the Company was not required to reinstate the employee.[4] In so doing the Court of Appeals for the Second Circuit stated:

> The arbitrator violated Article X, Paragraph 3, of the agreement which states that the arbitrator has no authority to add to or modify the terms of the agreement. The union and the company had agreed to a three-step grievance and arbitration procedure to cover situations such as this and these procedures represent the contractual agreement as to due process (App. 2a.).

Reasons for Denying the Writ.

The decision by the Second Circuit in the instant case fully comports with the guidelines established by this Court in the

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[4] The district court entered judgment in favor of the company on the Union's counterclaim, as well as on its separate action to confirm the award.

Steelworkers Trilogy,[5] delineating the responsibility of the federal judiciary to set aside arbitration awards under certain circumstances.

In this case the arbitrator patently ignored the parties' agreement with respect to the process to be followed when a dispute arises as to the propriety of an action by the Employer (here, whether a particular discharge is for "just cause"). Instead the arbitrator "imposed his own brand of industrial justice" by imposing a predischarge hearing requirement which finds no support in the parties' agreement, intent or practice. Where, as here, a court determines that the award does not draw "its essence from the collective bargaining agreement" the course of action is exceedingly clear. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Steelworkers* v. *Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597.

Nor is the Second Circuit's decision in conflict with the decisions of any other circuit. Contrary to the Union's contention, the instant case is clearly distinguishable on its facts from the decision of the Eighth Circuit in *Chauffeurs, Teamsters and Helpers Local Union No. 878* v. *Coca-Cola Bottling Co.*, 613 F. 2d 716 (8th Cir. 1980), *cert. denied*, 48 U.S.L.W. 3786. Furthermore, decisions of the Fifth, Tenth and Seventh Circuits cited by Petitioner as being in conflict with the Second Circuit's decision herein, were decided on narrow grounds not here relevant.[6] In those cases the courts

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[5] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960).

[6] *Amalgamated Meat Cutters & Butchers, Local 540* v. *Neuhoff Brothers Packers, Inc.*, 481 F. 2d 817 (5th Cir. 1973); *Fabricut, Inc.* v. *Tulsa General Drivers*, 597 F. 2d 227 (10th Cir. 1979); *International Association of Machinists, District No. 8* v. *Campbell Soup Co.*, 406 F. 2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969).

determined that the arbitrator acted in accordance with the authority granted by the parties in each instance. Rather, the Second Circuit's decision is consistent with this Court's decision in *Enterprise Wheel & Car Corp., supra,* and the myriad of decisions by lower courts which have set aside an arbitrator's award where it was determined that the award does not draw its essence from the parties' collective bargaining agreement.

In order to insure the continued vitality of the arbitration process and to maintain the continuing confidence of parties to collective bargaining agreements in the resolution of their disputes through arbitration, courts must be prepared to set aside awards in those limited instances where such awards are contrary to their agreement.[7]

Inasmuch as the Second Circuit's decision follows the guidelines established by this Court in the *Steelworkers Trilogy,* allocating to the courts the authority to insure that arbitration awards manifest a fidelity to the particular collective bargaining agreement under review, a grant of the instant writ is not warranted.

I. The Action Taken by the Second Circuit in Setting Aside the Arbitrator's Decision Was in Accordance with This Court's Decisions Respecting the Authority of the Federal Courts to Review Arbitral Awards.

That arbitration is the preferred tribunal for resolving labor disputes cannot seriously be disputed. However, the continued viability of the arbitration process is placed in serious jeopardy if an arbitrator is granted unlimited power

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[7] See e.g., *Detroit Coil Co.* v. *International Association of Machinists & Aerospace Workers, Lodge # 82,* 594 F. 2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840, 100 S. Ct. 79 (1979); *Torrington Co.* v. *Metal Products Workers,* 362 F. 2d 677 (2d Cir. 1966).

to resolve industrial disputes on grounds which bear no relationship whatsoever to the intentions of the parties as manifested by their collective bargaining agreement.

This Court has long recognized that the courts have an important role in the arbitration process to insure that arbitral awards comport with the particular collective bargaining agreement being interpreted. When an award does not draw its essence from the agreement the courts have an obligation to set it aside. As this Court stated in *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597:

> (A)n arbitrator is confined to interpretation and application of the collective bargaining agreement; *he does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.* [Emphasis supplied.]

In applying the foregoing principles, the Second Circuit set aside the arbitrator's award on its view that the arbitrator exceeded the scope of authority delegated to him under the agreement. That Court found that by requiring a predischarge hearing, the arbitrator "inserted procedural requirements that were not called for in the collective bargaining agreement" (App. 2a). The Second Circuit held that by so doing, "(T)he arbitrator violated Article X, Paragraph 3 of the agreement which states that the arbitrator has no authority to add to or modify the terms of the agreement" (App. 2a).

As the Second Circuit found, the parties agreed to a three-step grievance and arbitration procedure for the resolution of disputes similar to that in question here. That procedure provides the parties' sole agreement as to the scope of pro-

cedural safeguards to be accorded to an individual protesting a discharge by the Company. Such a procedure has been characterized as establishing the system of governance within an industrial setting.[8]

A careful analysis of the arbitrator's award reveals that the Company did in fact have just cause for discharging Mennillo. In finding that Mennillo was "gravely insubordinate" (App. 27a), the arbitrator clearly found that the Company had just cause for discipline. If just cause for discipline were not found, the arbitrator would not have found even a suspension appropriate. The sole reason why the discharge was overturned was the arbitrator's view that a predischarge hearing was required. In imposing this unbargained for requirement, the arbitrator could not, as none was present, point to any specific contract clause which requires such a hearing. Rather, in disregard of the grievance and arbitration terms of the contract, which define the parties' agreement respecting due process for a discharged employee, the arbitrator added a predischarge requirement to the contract. By so doing the arbitrator violated the contractual admonition prohibiting him from adding to or modifying the terms of the contract and thereby imposed "his own brand of industrial justice" upon the parties despite the express contractual language of the grievance and arbitration clauses. *Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597.

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[8] "... (C)ollective bargaining agreements provide their own administrative or judicial machinery—the ascending steps of the grievance procedure culminating in final and binding arbitration." Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1492 (1959).

"The collective agreement, with its grievance procedure and arbitration, can be fairly characterized as a constitution of industrial government, a government bounded by a system of law and permeated with principles of equality and procedural due process." Summers, *Industrial Democracy: America's Unfulfilled Promise,* 28 Clev. St. L. Rev. 29, 35 (1979).

Contrary to Petitioner's suggestion that the Second Circuit engaged in "plenary review of the merits" (Petition for Writ of Certiorari at page 9), that Court merely exercised the authority granted it by this Court in *Enterprise Wheel* to set aside an award which does not draw its essence from the collective bargaining agreement. As the Sixth Circuit stated in *Timken Co.* v. *Local Union No. 1123, United Steelworkers of America,* 482 F. 2d 1012, 1015 n.2 (6th Cir. 1973):

> It is axiomatic that if the arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense his 'own brand of industrial justice,' the enforcement of the award must be denied.[9]

The parties could have agreed to a predischarge hearing and could have included such a provision in their agreement. They did not choose to do so. The contract did not so provide either expressly or impliedly. Rather, the contract specifically outlined the due process agreed to by the parties in the grievance and arbitration clause. By adding a predischarge hearing the arbitrator manifested his infidelity to the contract by in effect adding a contract term not agreed to by the parties in dereliction of the express limitation on his power to do so contained in the contract. Under these circumstances the Second Circuit had no choice but to refuse enforcement of the award. *Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597.

In *Flintkote Co.,* 59 L.A. 329 (1972), the arbitrator held that a discharged employee must be reinstated because he

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[9] See also: *Detroit Coil Co.* v. *International Association of Machinists & Aerospace Workers, Lodge # 82,* 594 F. 2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840, 100 S. Ct. 79 (1979); *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Hays & Nicoulin, Inc.,* 594 F. 2d 1093 (6th Cir. 1979); *Torrington Co.* v. *Metal Product Workers,* 362 F. 2d 677 (2d Cir. 1966).

was denied a predischarge hearing. However, the major distinction between *Flintkote* and the instant case is that the arbitrator premised his reinstatement on an express company rule requiring a hearing prior to discharge.

Here, there was no showing that the parties, either expressly or impliedly, meant the contract term "just cause" to encompass any predischarge due process hearing.[10] Rather, such an inference is specifically negated when the due process which the parties bargained for, namely the grievance and arbitration clause contained within the contract, is considered. By agreeing to such a process the parties determined that if the Company took any arbitrary action, an employee could be best protected by the grievance procedure culminating in a *de novo* hearing before an arbitrator. The process worked well here. The arbitrator found that the Company was justified in imposing discipline against a gravely insubordinate employee (App. 27a, 28a).

If this Court should uphold the arbitrator's construction of "just cause" as imposing a predischarge hearing, no employer who is a party to a collective bargaining agreement containing those terms, would ever be able to discharge any employee, irrespective of the circumstances, prior to granting a hearing.[11]

Petitioner's characterization of the Second Circuit's action as "judicial usurpation" (Petition for Writ of Certiorari at

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[10] Professor Clyde Summers in his article *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 504 (1976), stated the prevailing rule: "The employee is not entitled to a hearing before discipline is imposed, unless the contract so provides, but in arbitration he obtains a full *de novo* hearing."

[11] Inferentially left unanswered is the question as to what type of hearing would satisfy the due process standard should this Court uphold the arbitrator. For example, would the employee be entitled to the full panoply of rights found in due process hearings in other circumstances, including the right to cross-examination and representation of counsel?

page 10) is patently inaccurate. This Court in the *Steelworkers Trilogy* charged the courts with insuring that arbitration awards draw their essence from the parties' agreement. The mandate is clear. When the award manifests an infidelity to the contract it must be set aside.

Moreover, Petitioner's reliance on *Nolde Bros., Inc.* v. *Local No. 358, Bakery Workers,* 430 U.S. 243 (1977), and *Buffalo Forge Co.* v. *United Steelworkers,* 428 U.S. 397 (1976), is misplaced. The former case involved the question of whether an employer had a duty to arbitrate a dispute arising after the termination of the contract. The latter case examined the question of whether or not the parties agreed to submit a dispute to arbitration and held that where such a dispute was not arbitrable an injunction could not issue against an existing strike.

This Court has set the parameters of judicial involvement in the arbitration process. Where the award manifests an infidelity to the agreement, and the arbitrator, by adding new terms to the parties' agreement, imposes his own brand of industrial justice, the courts are obligated to set it aside in order to insure that parties maintain continued confidence in the resolution of industrial disputes through arbitration. Unless the courts are allowed to continue their limited review of arbitration awards as authorized by this Court in *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* there will be no way to insure that an arbitrator has "stayed within the areas marked out for his consideration." 363 U.S. at 598.

II. The Second Circuit's Decision Is Not in Conflict with the Decision of Any Other Circuit.

Petitioner relies primarily upon the decision of the Eighth Circuit in *Chauffeurs, Teamsters and Helpers, Local Union No. 878* v. *Coca-Cola Bottling Co.,* 613 F. 2d 716 (8th Cir. 1980), *cert. denied,* 48 U.S.L.W. 3786 (1980) to support its

position that a conflict exists between the circuits for resolution by this Court. It is submitted that such reliance is misplaced.

In *Coca-Cola, supra,* 613 F. 2d at 720, the Eighth Circuit held that where the contract's "just cause" term is silent as to the procedure required, an arbitrator may imply from that term procedural as well as substantive terms. The circumstances surrounding the discharge in *Coca-Cola* were such that the person making the discharge did not witness the events which he determined justified the action. To the contrary, Mennillo's supervisor in the instant case decided to discharge him solely because of his insubordinate conduct committed *in his presence* (App. 26a.). There was no need for any additional investigation, as there was in *Coca-Cola.* Without admitting the correctness of the *Coca-Cola* decision, it is submitted that under the circumstances which existed herein, and in view of the finding that the employee was "gravely insubordinate," immediate discharge was warranted. In *Coca-Cola,* where all of the facts were not clear, some type of predischarge investigation may have been appropriate.

Petitioner's reliance on *Amalgamated Meatcutters & Butchers, Local 540* v. *Neuhoff Brothers Packers, Inc.,* 481 F. 2d 817 (5th Cir. 1973), *Fabricut, Inc.* v. *Tulsa General Drivers,* 597 F. 2d 227 (10th Cir. 1979), and *International Association of Machinists, District No. 8* v. *Campbell Soup Co.,* 406 F. 2d 1223 (7th Cir. 1969), *cert. denied,* 396 U.S. 820 (1969), as being in conflict with the Second Circuit's decision herein is similarly misplaced. In *Fabricut,* the Tenth Circuit merely upheld the arbitrator's well established discretion to limit the discipline to fit the misconduct. In *Campbell Soup,* the court merely enforced the arbitrator's resolution of two seemingly conflicting company rules bearing on the particular facts of that case. And in *Neuhoff Brothers,* the Fifth

Circuit enforced an arbitrator's imposition of the accepted burden of proof for discharges involving criminal intent. None of these cases raises the issue decided by the Second Circuit herein.

The Union contends that if the Second Circuit's decision is not reviewed, arbitration will somehow lose its effectiveness in setting aside "peremptory and unfair discharges." (Petition for Writ of Certiorari at page 14.) It is submitted that the impact of this case does not reach the magnitude suggested by the Union. If review is denied here, arbitrators will continue to set aside the imposition of discipline in those cases where the facts indicate that an employer acted in an arbitrary manner and without just cause within the meaning of a particular collective bargaining agreement. The decision of the Second Circuit in no way impinges upon the protection afforded employees against "peremptory and unfair discharges."

It should be reemphasized that here the employee was "gravely insubordinate." This is not the type of case where discipline was imposed for mere whim or caprice. Denial of the writ here will in no way hinder an arbitrator from countermanding an employer action where the facts indicate that the action was not for just cause. In order to insure that arbitrators stay within the bounds prescribed by this Court, and collective bargaining agreements which they interpret, the Writ of Certiorari should be denied.

Conclusion.

For all of the foregoing reasons it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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